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MEMORANDUM

TO: Bram Claeys, Massachusetts Department of Energy Resources

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CC: Wendy Jacobs and Shaun Goho

DATE: May 6, 2015

RE: Authority of Massachusetts Agencies to Adopt a Mandatory Pellet Standard

I. INTRODUCTION

This memorandum was written in response to a request by the Massachusetts Department of Energy Resources (“DOER”) for an analysis of the authority of different Massachusetts agencies¹ to regulate wood pellet composition, conformation, and supply chain standards.² This memorandum focuses on three statutes that plainly authorize DOER or the Massachusetts Department of Environmental Protection (“DEP”) to regulate wood pellets.

This memorandum does not discuss Executive Order Number 562, issued by Governor Baker on March 31, 2015 or its implications for agency rulemakings.

II. ANALYSIS

A. DOER May Regulate Wood Pellets Under Its General Authority to “Promulgate Regulations Necessary to Carry Out [Its] Statutory Responsibilities.”

DOER has authority to regulate the composition, conformation, and supply chain of wood pellets under its organic act. M.G.L. c. 25A, §§ 2, 6. Under section 2 of this act, DOER

¹ Generally, states derive their authority to enact environmental laws promoting public health and safety from their traditional police powers. The police power is “the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws . . . as they [sic] shall judge to be for the good and welfare of the [C]ommonwealth, and of the subjects of the same.” *Commonwealth v. Alger*, 61 Mass. 53, 85 (1851). Massachusetts derives its general authority to regulate pellets from its police power.

² For the purposes of this memorandum, “supply chain” refers to all potential regulation regarding where the wood comprising pellets is sourced and tracking wood through the chain of custody. “Conformation” refers to the regulations regarding pellet shape, size, and density. “Composition” refers to the chemical and physical make up of pellets, including impurities, ash, and other chemical properties.

must have three divisions, one of which is the “division of renewable and alternative energy development.” M.G.L. c. 25A, § 2.³ This division has the responsibility to, among other things, “advance the production and use of biofuels.” *Id.* Section 6 provides that “[t]he department and its appropriate administrative units shall . . . promulgate rules and regulations necessary to carry out their statutory responsibilities.” *Id.*

Taken together, sections 2 and 6 provide that DOER has the duty to promulgate rules necessary to “advance” the production and use of biofuels. If DOER wanted to impose minimum standards on wood pellets sold in Massachusetts, the question would be whether such regulation would count as “advancing” the production and use of biofuels. When interpreting a statute, one starts with a term’s plain meaning. Webster’s dictionary defines “advance” to mean “to accelerate the growth or progress of.”⁴ The Oxford English Dictionary provides a broader definition: “to further, promote, advantage.”⁵ Under either definition, the term “advance” is capacious enough to encompass the adoption of standards to ensure that biofuels are safe, reliable, and promote greenhouse gas mitigation.

Composition and conformation standards advance the production and use of biofuels by promoting pellet heaters’ reputation as a clean and efficient fuel source and by promoting consumer confidence that pellets are a safe and reliable product. In this way, pellet standards may actually spur growth in demand for pellets, as was observed when Germany and Austria created pellet standards.⁶ By creating a more reliable product for consumers, pellet standards can increase the market for biofuels.

Supply chain standards also “advance” biofuels. First, as discussed below, they reinforce and supplement the efficacy of composition and conformation standards.⁷ Second, they help reduce greenhouse gas emissions, which is the broader purpose for which the state promotes

³ The full text of the provision reads:

There shall be within the department 3 divisions: (i) a division of energy efficiency, which shall work with the department of public utilities regarding energy efficiency programs; (ii) a division of renewable and alternative energy development, which shall oversee and coordinate activities that seek to maximize the installation of renewable and alternative energy generating sources that will provide benefits to ratepayers, advance the production and use of biofuels and other alternative fuels as the division may define by regulation, and administer the renewable portfolio standard and the alternative portfolio standard; and (iii) a division of green communities, which shall serve as the principal point of contact for municipalities and other governmental bodies concerning all matters under the jurisdiction of the department of energy resources.

M.G.L. c. 25A, § 2.

⁴ “Advance” definition, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/advance>.

⁵ “Advance” definition, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/2884?rskey=BdPzFM&result=2&isAdvanced=false#eid>.

⁶ See Intelligent Energy Europe, Advancement of Pellets-Related European Standard 4 (2009) available at http://ec.europa.eu/energy/intelligent/projects/sites/iee-projects/files/projects/documents/pelletslas_pellet_standards.pdf.

⁷ See *infra* p. 5.

biofuels.⁸ In 2010, DOER commissioned the Biomass Sustainability and Carbon Policy Study, which showed that biofuels' lifecycle greenhouse gas emissions vary based on the management practices at the forest from which the fuel is sourced.⁹ Mandatory supply chain standards would promote only pellet production processes that create real greenhouse gas benefits. Supply chain standards also create a larger market for sustainably sourced pellets, which in turn improves the pellets' ability to mitigate greenhouse gases and advances the broader purpose of using biofuels.

These reasons strongly support the conclusion that M.G.L. c. 25A, § 2 authorizes DOER to create mandatory composition, conformation, and supply chain standards for wood pellets.¹⁰ Moreover, even if a reviewing court were to find that the grant of authority under the statute was insufficiently clear, Massachusetts courts generally defer to an agency's reading of ambiguous statutes. *See Cleary v. Cardullo's, Inc.*, 347 Mass. 337, 344 (1964).

DOER's authority under M.G.L. c. 25A, § 2 is not limited to any class of people, such as operators or vendors. As such, under this authority, DOER may enforce pellet standards against any party along the supply chain as long as doing so is consistent with the dormant Commerce Clause.¹¹

B. DEP May Regulate Wood Pellets Under Its General Authority to “Prevent Pollution or Contamination of the Atmosphere” Under the Massachusetts Clean Air Act (MGL c. 111, § 142A).

DEP has authority under the Massachusetts Clean Air Act to adopt composition, conformation, and supply chain standards for wood pellets.¹² The Clean Air Act provides DEP with broad authority, stating that DEP “may from time to time adopt regulations . . . to prevent pollution or contamination of the atmosphere.” M.G.L. c. 111, § 142A. Although the Act does not define “pollution or contamination of the atmosphere,” *see* M.G.L. c. 111, § 1, this language

⁸ *See, e.g.*, Climate Protection and Green Energy Economy Advisory Committee, Massachusetts Clean Energy and Climate Plan ES-3 (Dec. 29, 2010), *available at* <http://www.mass.gov/eea/docs/eea/energy/2020-clean-energy-plan.pdf> (identifying “biomass heating” as an element of a new policy designed to lower greenhouse gas emissions from buildings).

⁹ *See* Manomet Center for Conservation Sciences, Biomass Sustainability and Carbon Policy Study (2010) *available at* <http://www.mass.gov/eea/docs/doer/renewables/biomass/manomet-biomass-report-full-hirez.pdf>.

¹⁰ It is also clear that DOER's authority to advance the production and use of biofuels is distinct from its authority to promote their use through the renewable portfolio standard and alternative portfolio standard. Under M.G.L. c. 25A, § 2, the Division of Renewable and Alternative Energy Development has three separate duties: first, to oversee the installation of renewable technologies; second, to advance biofuels; and third, to administer the RPS and APS. It is a basic principle of statutory interpretation that laws should be read to give each clause distinct meaning. *See, e.g., Com. v. Kerr*, 409 Mass. 284, 290 (1991). Therefore, DOER's responsibility to “advance” biofuels must be given a distinct meaning from its responsibility to administer the incentive-based biofuel program of the APS.

¹¹ This issue is discussed in a separate memorandum on the dormant Commerce Clause.

¹² The full text of the provision reads: “The department of environmental protection, referred to in this section and in sections one hundred and forty-two B through one hundred and forty-two M, inclusive, as the department may from time to time adopt regulations, pursuant to this section and sections one hundred and forty-two B through one hundred and forty-two M, inclusive, to prevent pollution or contamination of the atmosphere.” M.G.L. c. 111, § 142A.

is broad enough to encompass both the local air quality and greenhouse gas issues that composition, conformation, and supply chain pellet standards aim to address.

The language in M.G.L. c. 111, § 142A clearly authorizes DEP to regulate pellet composition and conformation standards. Although the act does not define “pollution or contamination of the atmosphere,” in its regulations under the state Clean Air Act, DEP defines “air contaminants” to mean “any substance . . . in the ambient air space and includes, but is not limited to . . . gas, fume, mist, odor, smoke . . . heat, [or] sound.”¹³ 310 CMR 7.00. In addition, the regulations define “air pollution” to mean the presence of contaminants in the “ambient air space” sufficient to

(a) cause a nuisance; (b) be injurious, or be on the basis of current information, potentially injurious to human or animal life, to vegetation, or to property; or (c) unreasonably interfere with the comfortable enjoyment of life and property or the conduct of business.

Id. Composition and conformation standards for wood pellets are aimed at improving local air quality, primarily through reducing particulate matter (“PM”) emissions from pellet-burning heaters. PM emissions may cause heart attacks, decreased lung function, and premature death in vulnerable populations.¹⁴ DEP is already regulating PM emissions through its state implementation plan and other air quality regulations pursuant to its authority under M.G.L. c. 111, § 142A. *See, e.g.*, 310 CMR 7.00. As such, it is clear that DEP has the authority to impose composition and conformation standards, because they will reduce PM emissions, thereby reducing “pollution or contamination of the atmosphere.” M.G.L. c. 111, § 142A.

Further supporting this conclusion is the fact that DEP is already using its authority under the state Clean Air Act to regulate wood pellets used in outdoor wood boilers as a part of its state implementation plan. *See* 310 CMR 7.26(52)(d-e).¹⁵ In 2007, DEP promulgated regulations prohibiting operators of outdoor wood boilers from using any pellets that are not made from “clean wood.” 310 CMR 7.26(52)(e). The regulation defines “clean wood” as “wood that has no paint, stains, or other types of coatings, and wood that has not been treated with preservatives, including but not limited to, copper chromium arsenate, creosote, or pentachlorophenol.” 310 CMR 7.26(51). The fact that DEP has already regulated wood pellets in this way for almost a decade supports the conclusion that it has the authority to do so.

¹³ The full text of the regulation reads: “AIR CONTAMINANT means any substance or man-made physical phenomenon in the ambient air space and includes, but is not limited to, dust, flyash, gas, fume, mist, odor, smoke, vapor, pollen, microorganism, radioactive material, radiation, heat, sound, any combination thereof, or any decay or reaction product thereof.” 310 CMR 7.00.

¹⁴ EPA, *Particulate Matter – Health*, <http://www.epa.gov/pm/health.html>. Because of the substantial risk that PM emissions pose to human health, the EPA has listed PM as a criteria pollutant under the federal Clean Air Act, meaning that it is a type of pollutant that “results from numerous or diverse sources” and “may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7408(a)(1). This listing is further evidence that efforts to mitigate PM are clearly within the DEP’s authority to regulate air contaminants.

¹⁵ *See* EPA, *EPA-Approved Massachusetts Regulations*, http://www.epa.gov/region1/topics/air/sips/sips_ma.html.

The Clean Air Act provides DEP with authority to regulate the pellet supply chain on different grounds. Supply chain standards serve two purposes: first, to bolster composition and conformation standards aimed at improving local air quality, and second, to mitigate greenhouse gas emissions from harvesting and burning pellets.

Supply chain standards can bolster composition standards by tracking the pellet feedstock throughout the chain of custody from the forest to the pellet mill to ensure that the process results in clean pellets. By monitoring the supply chain, DEP may minimize the risk of introducing toxics, heavy metals, or improper feedstocks like construction waste. In this way, supply chain standards would promote local air quality similarly to composition standards. For example, the EN-Plus certification model relies on auditing pellet mills' entire supply chain, rather than just testing the final product, to ensure that pellets are properly produced. By comparison, the Pellet Fuels Institute certification scheme, which lacks procedures to verify production processes, must ensure compliance to composition standards through more frequent testing of pellets. Supply chain standards that ensure compliance with composition standards are authorized under M.G.L. c. 111, § 142A as an additional way to reduce PM emissions, thereby reducing "pollution or contamination of the atmosphere." M.G.L. c. 111, § 142A.

Some supply chain standards, such as those mandating sustainable management practices at forests from which pellets are sourced, may be specifically aimed at reducing greenhouse gas emissions. The question then arises whether such a standard constitutes a regulation "to prevent pollution or contamination of the atmosphere." DEP has previously interpreted this grant of authority to include the right to regulate greenhouse gas emissions. *See, e.g.*, 310 CMR 7.70 (implementing regulations for greenhouse gas emitters to trade carbon credits under the Regional Greenhouse Gas Initiative); 310 CMR 7.70 (implementing regulations to reduce greenhouse gas emissions from gas-insulated switchgear). In addition, the U.S. Supreme Court has found that, in the context of the federal Clean Air Act, greenhouse gases plainly constitute "air pollutants." *Massachusetts v. E.P.A.*, 549 U.S. 497, 532 (2007). Although the state Clean Air Act does not define "pollution or contamination of the atmosphere," this federal definition suggests the appropriateness of including greenhouse gases in the state's definition. A reviewing court would likely defer to DEP's inclusion of greenhouse gases within that definition for the purposes of the state Clean Air Act. *See Cleary*, 347 Mass. at 344. Thus, supply chain standards that are aimed at reducing greenhouse gas emissions are also consistent with DEP's authority to reduce "pollution or contamination of the atmosphere." M.G.L. c. 111, § 142A.

Again, this statute does not impose any constraint on which parties DEP may regulate, so DEP may enforce pellet standards against any party along the supply chain as long as doing so is consistent with the dormant Commerce Clause.

C. DOER or DEP May Regulate Wood Pellets Under the Global Warming Solutions Act

An additional source of authority under which either DOER or DEP could regulate the supply chain, composition, and conformation of wood pellets is the Global Warming Solutions

Act (“GWSA”). M.G.L. c. 21N, § 6.¹⁶ The GWSA serves as a stand-alone grant of authority for pellet regulations and as supplementary authority to DOER or DEP if the agency regulates under one of the above-named statutes.

Section 6 of the GWSA provides that: “In implementing its plan for statewide greenhouse gas emissions limits, the commonwealth and its agencies shall promulgate regulations that . . . increase efficiency and encourage renewable sources of energy in the sectors of energy generation [and] buildings.” M.G.L. c. 21N, § 6. Supply chain standards would plainly constitute regulations in the sectors of energy generation and/or buildings. Supply chain standards “increase efficiency” in the sense that they reduce the greenhouse gas intensity of pellets per unit of thermal energy. In addition, supply chain standards “encourage renewable sources of energy” by ensuring that pellet fuels are truly renewable because they guarantee that pellets are sourced from sustainably managed forests. The GWSA therefore authorizes pellet supply chain regulations aimed at reducing greenhouse gases.

In addition, composition and conformation standards “encourage renewable sources of energy” by promoting consumer confidence in pellets as discussed above. Similarly to the ways in which composition and conformation standards “advance” pellets by promoting a pellet market, composition and conformation standards “encourage” renewable sources of energy by providing consumers with the confidence to choose safe, reliable pellets over other potential energy sources. As such, pellet supply chain, composition, and conformation standards all fall within agencies’ authority under the GWSA.

Notably, the first clause of section 6 states that the Commonwealth and its agencies are to exercise this authority “[i]n implementing its plan for statewide greenhouse gas emissions limits.” M.G.L. c. 21N, § 6. The referenced plan is the Massachusetts’ Clean Energy and Climate Plan for 2020 (the “2020 Plan”).¹⁷ The 2020 plan explicitly aims to promote the use of renewable woody biomass for thermal heat. The 2020 Plan aims to reduce greenhouse gas emissions by 0.1 million metric tons from “all renewable thermal technologies, including heat-pumps, biomass/biofuels, and solar thermal applications.”¹⁸ The plan goes on to highlight the importance of ensuring that policies only promote biofuels that will achieve real greenhouse gas emissions reductions, stating that “GHG emissions from biomass and biofuels used for thermal energy are important to consider, but Massachusetts policies will limit the eligibility of feedstocks (advanced biofuels and residue woody biomass) to those which demonstrate real and rapid GHG benefits, such as advanced biofuels and residue woody biomass.”¹⁹ Supply chain standards are compatible with this purpose because they limit the “eligibility of feedstocks . . . to those which demonstrate real . . . GHG benefits.”²⁰ In addition, by promoting the adoption of

¹⁶ The full text of the provision reads: “In implementing its plan for statewide greenhouse gas emissions limits, the commonwealth and its agencies shall promulgate regulations that reduce energy use, increase efficiency and encourage renewable sources of energy in the sectors of energy generation, buildings and transportation.” M.G.L. c. 21N, § 6.

¹⁷ Climate Protection and Green Energy Economy Advisory Committee, *Massachusetts Clean Energy and Climate Plan* (2010), available at <http://www.mass.gov/eea/docs/eea/energy/2020-clean-energy-plan.pdf>.

¹⁸ See *id.* at 29.

¹⁹ See *id.* at 29-30.

²⁰ *Id.*

pellets generally, composition and conformation standards may be important for agencies' implementation of the 2020 Plan's goal of reducing greenhouse gases through the adoption "renewable thermal technologies."²¹

As with the other statutes, the GWSA provides a broad grant of authority that is not limited to any specific agency or covered party, so under its authority DOER or DEP may regulate the actions of any party along the supply chain as long as doing so is consistent with the dormant Commerce Clause.

²¹ *See id.* at 29.